No. 16-1140

IN THE

Supreme Court of the United States

NATIONAL INSTITUTE OF FAMILY AND LIFE ADVOCATES, dba NIFLA, *et al.*,

Petitioners,

—v.—

XAVIER BECERRA, Attorney General of California, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR *AMICI CURIAE* EQUAL RIGHTS ADVOCATES, PLANNED PARENTHOOD AFFILIATES OF CALIFORNIA, CALIFORNIA WOMEN LAWYERS, HADASSAH, AND THE FAMILY VIOLENCE APPELLATE PROJECT IN SUPPORT OF RESPONDENTS

SANFORD JAY ROSEN
Counsel of Record
GAY CROSTHWAIT GRUNFELD
DEVIN W. MAUNEY
ROSEN BIEN GALVAN
& GRUNFELD LLP
50 Fremont Street, 19th Floor
San Francisco, California 94105
(415) 433-6830
srosen@rbgg.com

Counsel for Amici Curiae Equal Rights Advocates, Planned Parenthood Affiliates of California, California Women Lawyers, Hadassah, and the Family Violence Appellate Project

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TABLE OF AUTHORITIES

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CASES

Fargo Women's Health Org., Inc. v. Larson,
381 N.W.2d 176 (N.D. 1986) 9

First Resort, Inc. v. Herrera,
860 F.3d 1263 (9th Cir. 2017) 7, 13, 16, 20

Lewis v. Pearson Found., Inc.,
908 F.2d 318 (8th Cir.), *on reh'g*, 917 F.2d
1077 (8th Cir. 1990) 10

Nat'l Inst. of Family & Life Advocates v. Harris,
839 F.3d 823 (9th Cir. 2016) 28

Schenck v. United States,
249 U.S. 47 (1919) 6

Whitney v. California,
274 U.S. 357 (1927) 3

*Zauderer v. Office of Disciplinary Counsel of
the Sup. Ct. of Ohio*,
471 U.S. 626 (1985) 29

STATUTES

Cal. Health & Safety Code § 1200 ..... 26, 27

Cal. Health & Safety Code § 1204 ..... 29, 30

Cal. Health & Safety Code § 1206 ..... 29, 30

Cal. Health & Safety Code § 123471 ..... 32, 33

PAGE(S)

Cal. Health & Safety Code § 123472 ..... *passim*

Cal. Welf. & Inst. Code § 24005 ..... 30, 31

OTHER AUTHORITIES

2015 Cal. Legis. Serv. Ch. 700 (A.B. 775) 20, 23

About NIFLA, National Institute of Family and Life Advocates, https://nifla.org/about-nifla/ (last visited Feb. 25, 2018) 5, 25

A Comprehensive Medical Conversion Program, National Institute of Family and Life Advocates, https://nifla.org/life-choice-project-tlc/ (last visited Feb. 25, 2018) 30

Amanda Marcotte, *New Anti-Choice Tactic: Pretend to Be Pro-Choice*, Slate (Oct. 9, 2014, 12:52 PM), available at: http://www.slate.com/blogs/xx_factor/2014/10/09/third_box_anti_abortion_clinic_rebrands_itself_as_a_pro_choice_counseling.html 13

Analysis of California Senate Bill (SB) 999 Contraceptives: Annual Supply, Cal. Health Benefits Review Program (March 28, 2016), http://analyses.chbrp.com/document/view.php?id=1207 22

Assemb. Comm. on Judiciary, *Reproductive FACT Act*, Cal. Assemb. Reg. Sess. 2015-2016 (April 16, 2015) 29, 33

PAGE(S)

Australian Institute for Judicial Administration, *Sexual and reproductive abuse*, National Domestic and Family Violence Bench Book § 3.1.2 (May 2017), http://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/sexual-and-reproductive-abuse/ 24

Cal. Dep't of Health Care Svcs., *Family PACT Overview* (June 2015), http://www.familypact.org/Providers/provider-resources/TipSheets/Overview6-15ADA.pdf 30

Cal. Dep't of Health Care Svcs., *Family PACT Program Standards* (Jan. 2018), available at: http://www.familypact.org/Providers/policies-procedures-and-billing-instructions 34

California Planned Parenthood Education Fund, Inc. Fact Sheet, Planned Parenthood Affiliates of California (2015), available at: http://www.ppactionca.org/voter-resources/fact-sheets.html 21

Casey Watters *et al.*, *Pregnancy Resource Centers: Ensuring Access and Accuracy of Information*, Public Law Research Institute, U.C. Hastings College of Law (April 1, 2011) 8

PAGE(S)

Comm. on Health Care for Underserved Women, Opinion Number 586, *Health Disparities in Rural Women*, American College of Obstetricians and Gynecologists (February 2014), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Disparities-in-Rural-Women 24

Crisis Pregnancy Centers Lie: The Insidious Threat to Reproductive Freedom, NARAL Pro-Choice America (2015) ("*NARAL National CPC Report*"), https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf ..... *passim*

Frequently Asked Questions, Heartbeat International, https://www.heartbeatservices.org/about-us/faqs#CN (last visited Feb. 24, 2018) 5

Hayley Tsukayama, *Google removes "deceptive" pregnancy center ads*, Wash. Post (April 28, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/04/28/naral-successfully-lobbies-google-to-take-down-deceptive-pregnancy-center-ads/?utm_term=.16d848a566c1 ..... 4, 11, 13

Heartbeat Program Policies, Heartbeat International, https://www.heartbeatservices.org/about-us (last visited Feb. 25, 2018) 5, 12

PAGE(S)

Jenny Kutner, *Crisis pregnancy center tells woman her IUD is "your baby," plus countless other lies*, Salon (March 18, 2015), https://www.salon.com/2015/03/18/crisis_pregnancy_center_tells_woman_her_iud_is_your_baby_plus_countless_other_lies/ 19, 20

Julian Hattem, *NARAL adds Yahoo success after Google*, The Hill (May 9, 2014), http://thehill.com/policy/technology/205701-after-pressure-yahoo-drops-crisis-pregnancy-center-ads 14

Kaiser Permanente: Refers Pregnant Patients to Anti-Abortion Counseling Clinic, California Healthline (Jan. 15, 1999), https://californiahealthline.org/morning-breakout/kaiser-permanente-refers-pregnant-patients-to-antiabortion-counseling-clinic/ 13

Kathryn Doyle, *Reproductive Control Can be a Form of Partner Violence*, Reuters (September 4, 2015), https://www.reuters.com/article/us-health-sexassault-coercion/reproductive-control-can-be-a-form-of-partner-violence-idUSKCN0R42CD20150904.....25

Katie J.M. Baker, *New National Women's Clinic "Third Box" Has Anti-Abortion Past*, BuzzFeed News (October 8, 2014), https://www.buzzfeed.com/katiejmbaker/new-national-womens-clinic-third-box-has-anti-abortion-past?utm_term=.lfGbd29Z6#.twBnE0klg.....12

PAGE(S)

Laura Santhanam, *Why is the teen birth rate so much higher in rural areas?*, PBS (Nov 16, 2016 10:28 AM), https://www.pbs.org/newshour/health/teen-birth-rate-higher-rural-areas 23

Lisa Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421 (2007) 24

Medical Clinic Conversion, National Institute of Family and Life Advocates, https://nifla.org/medical-clinic-conversion/ (last visited Feb. 25, 2018) 29

Minority Staff of H. Comm. on Gov't Reform, 109th Cong., *False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers* (July 2006) ("Waxman Report") 4, 16

Molly Redden, *One State Finally Cracked Down on Deceptive Anti-Abortion Pregnancy Centers*, Mother Jones (Oct. 12, 2015), https://www.motherjones.com/politics/2015/10/state-just-became-first-crack-down-deceptive-anti-abortion-pregnancy-centers/ 19, 26

Nicole Georges *et al.*, *Yahoo and Google are Still Running Deceptive Anti-Abortion Ads*, Vice News (May 9, 2014 12:20 PM), https://news.vice.com/article/yahoo-and-google-are-still-running-deceptive-anti-abortion-ads 14

PAGE(S)

Pam Belluck, *Pregnancy Centers Gain Influence in Anti-Abortion Arena*, N.Y. Times (Jan. 4, 2013), http://www.nytimes.com/2013/01/05/health/pregnancy-centers-gain-influence-in-anti-abortion-fight.html?_r=0&pagewanted=all 15, 16

Pregnancy Care Clinic, www.unplannedparenthood.org (last visited Feb. 25, 2018) 10

Pregnancy Center Standards of Affiliation, Care Net (January 2013), http://cdn2.hubspot.net/hub/367552/file-2184386735-pdf/Preg-Center-Standards-of-Affilition-1-13-C.pdf?t=1418138924001 ..... 5, 12

Rachel Camp, *Coercing Pregnancy*, 21 Wm. & Mary J. Women & L. 275 (2015) 24

Regulating Disclosure of Services and Sponsorship of Crisis Pregnancy Centers, Policy Number 20113, American Public Health Association (Nov. 1, 2011), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/22/08/33/regulating-disclosure-of-services-and-sponsorship-of-crisis-pregnancy-centers 7, 8

PAGE(S)

Robin Abcarian, *Going undercover at crisis pregnancy centers*, L.A. Times (May 1, 2015), http://www.latimes.com/local/abcarian/la-me-0501-abcarian-crisis-pregnancy-20150501-column.html 4, 16, 18, 19

S. Comm. on Health, *Reproductive FACT Act* 4, Cal. S. Reg. Sess. 2015-2016 (May 4, 2015).....8, 22

See Our Services, Fallbrook Pregnancy Resource Center, http://www.fallbrookprc.com/Our-Services (last visited Feb. 25, 2018) 25, 28

Services, Pregnancy Care Clinic, http://www.supportpcc.com/services/ (last visited Feb. 25, 2018) 11, 25

State Facts About Unintended Pregnancy: California, Guttmacher Institute (2017), https://www.guttmacher.org/sites/default/files/factsheet/up-ca.pdf.....21

State Facts on Publicly Funded Family Planning Services: California, Guttmacher Institute (September 2017), https://www.guttmacher.org/fact-sheet/state-facts-publicly-funded-family-planning-services-california#1 21

Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, Guttmacher Policy Review, Vol. 9, Issue 3 (Aug. 1, 2006), https://www.guttmacher.org/gpr/2006/08/abortion-and-mental-health-myths-and-realities#boxref1 16

PAGE(S)

Tara Culp-Ressler, *"Crisis Pregnancy Center" Tells Women Her IUD Was A Baby*, ThinkProgress, (March 13, 2015, 1:49 PM), https://thinkprogress.org/crisis-pregnancy-center-tells-woman-her-iud-was-a-baby-46b1b5eb8237/ 15, 18, 20, 27

The California Healthcare Landscape, The Henry J. Kaiser Family Foundation (Aug. 26, 2015), https://www.kff.org/health-reform/fact-sheet/the-california-health-care-landscape/ 23

Ultrasound May End Abortion, Care Net (June 5, 2003), https://www.care-net.org/press-release-060503 30

Unintended Pregnancy In the United States, Guttmacher Institute (September 2016), https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us_0.pdf 22

Unmasking Fake Clinics: The Truth About Crisis Pregnancy Centers in California, NARAL Pro-Choice California Foundation (2010) ("*California CPC Investigation*"), available at: https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf ..... *passim*

Waiting Periods for Abortion, Guttmacher Institute (January 2018), https://www.guttmacher.org/evidence-you-can-use/waiting-periods-abortion 20

PAGE(S)

Why Ultrasounds Matter for Women Planning Abortion, Care Net (Dec. 14, 2014), https://www.care-net.org/center-insights-blog/why-ultrasounds-matter-for-women-planning-abortion.....30

INTEREST OF *AMICI CURIAE*[1]

Equal Rights Advocates, founded in 1974, is a national non-profit legal advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. In concert with ERA's commitment to securing gender equity in the workplace and in schools, ERA seeks to preserve women's right to reproductive choice and protect women's access to health care, including safe, legal contraception and abortion. In addition to litigating cases on behalf of workers and students and providing free legal advice and counseling to hundreds of women each year, ERA has participated in numerous *amicus* briefs in this Court in cases affecting these rights.

Planned Parenthood Affiliates of California is a not-for-profit organization that leads the state-wide public policy and advocacy work on behalf of the seven separately incorporated Planned Parenthood affiliates in California. PPAC's affiliates operate 115 health centers, handling approximately 1.5 million patient visits each year. Affiliated health centers offer a full range of reproductive healthcare, and in some cases, primary care. PPAC's mission is to create a safe climate where individuals have universal and unfettered access to reproductive healthcare services and are free to follow their own beliefs, values, and moral codes when making their own healthcare decisions.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

California Women Lawyers is a non-profit organization chartered in 1974. CWL is the only statewide bar association for women in California, and maintains a primary focus on advancing women in the legal profession. CWL works to better the position of women in society and to eliminate all inequities based on sex. CWL has participated in a wide range of cases to secure the equal treatment of women.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 Members, Associates and supporters nationwide. While traditionally known for its role in developing and supporting healthcare and other initiatives in Israel, Hadassah has longstanding commitments to improving healthcare access in the United States, particularly with regard to the healthcare needs of women. Hadassah strongly supports full and complete access to reproductive healthcare services and a woman's right to make health decisions according to her own religious, moral and ethical values, and recognizes the role that reproductive freedom plays in women's empowerment, economic equity and security.

Family Violence Appellate Project is the only nonprofit organization in California dedicated to representing domestic violence survivors in civil legal appeals for free. FVAP represents low-income survivors who need to appeal dangerous trial court decisions that leave them or their children at risk of ongoing abuse. Partnering with pro bono attorneys from California's top law firms and corporate legal teams, FVAP helps abuse survivors throughout California get the safety and justice they deserve. FVAP's goal is to empower abuse survivors through the court system and ensure that they and their

children can live in safe and healthy environments, free from abuse. Because domestic abusers may use reproductive abuse as a tactic of exercising coercive control over their intimate partners, the ability to seek accurate information about reproductive health is especially important to survivors of abuse. A woman who has been traumatized by having her autonomy undermined, often through violence, and who as a result has been denied access to reproductive health services, or forced to become pregnant against her will, or who is being abused into terminating a pregnancy she wishes to continue, will be particularly vulnerable to and harmed by false and manipulative practices that would be permitted if the FACT Act were overturned.

INTRODUCTION AND SUMMARY OF ARGUMENT

A growing number of "Crisis Pregnancy Centers" ("CPCs") use deceptive tactics to draw in women and dispense medically inaccurate and incomplete information that jeopardizes the health and lives of many women, especially low-income and other at-risk women. In this brief, *Amici* marshal abundant facts revealing this epidemic of deceptive and plainly false information.

In 1927, Justice Brandeis instructed the State of California how to confront fraudsters and peddlers of deception: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). The State of California has heeded this advice and mandated the posting of nonintrusive,

truthful disclosures to provide women the information they need to make informed healthcare choices.

Most CPCs lack state-issued licenses to provide healthcare, but many unlicensed CPCs masquerade as medical offices. Other CPCs obtain state-issued medical licenses, but offer incomplete information and almost no medical care.

Both licensed and unlicensed CPCs commonly employ deceptive tactics to lure women into their facilities and peddle medical misinformation to those they ensnare. References to CPCs in this brief include both licensed and unlicensed entities unless otherwise specified.

One study revealed that 79 percent of the CPC advertisements appearing on Google indicated that the CPCs provided abortions and other medical care, when in fact, these "clinics" do not offer such services and their mission is merely to admonish women not to have abortions. *See* Hayley Tsukayama, *Google removes "deceptive" pregnancy center ads*, Wash. Post (April 28, 2014), https://www.washingtonpost.com/news/the-switch/wp/2014/04/28/naral-successfully-lobbies-google-to-take-down-deceptive-pregnancy-center-ads/?utm_term=.16d848a566c1.

Other studies reveal that CPCs routinely misstate medical facts. *E.g.*, Minority Staff of H. Comm. on Gov't Reform, 109th Cong., *False and Misleading Health Information Provided by Federally Funded Pregnancy Resource Centers* 7 (July 2006) ("Waxman Report") (finding that 87 percent of clinics surveyed "provided false or misleading information"). For example, a volunteer investigator who visited 43 CPCs in California recalled that "[e]very clinic [she visited] spouted the lie that abortions cause breast cancer." Robin Abcarian, *Going undercover at crisis pregnancy*

centers, L.A. Times (May 1, 2015), http://www.latimes.com/local/abcarian/la-me-0501-abcarian-crisis-pregnancy-20150501-column.html. CPC counselors also told her, "Condoms have a bunch of little holes you might not know about." *Id.*

While they spread medical misinformation, unlicensed CPCs deliberately avoid activities that would bring them within the scope of California's regulatory scheme. But these same entities frequently adopt the appearance of medical offices. The Reproductive FACT Act reasonably requires unlicensed clinics that hold themselves out as pregnancy or reproductive care providers to disclose their unlicensed status. Cal. Health & Safety Code § 123472(b)(1).

Licensed CPCs represent themselves as comprehensive reproductive healthcare providers, but provide almost no medical services. Several of the most prominent CPC networks explicitly prohibit their member clinics from offering any contraceptives, or even referring women to providers that do. *See, e.g.*, *Heartbeat Program Policies*, Heartbeat International, https://www.heartbeatservices.org/about-us (last visited Feb. 25, 2018); *Pregnancy Center Standards of Affiliation*, Care Net (January 2013), http://cdn2.hubspot.net/hub/367552/file-2184386735-pdf/Preg-Center-Standards-of-Affilition-1-13-C.pdf?t=1418138924001. Petitioner NIFLA suggests that CPCs obtain licenses not to offer medical care, but to convince women not to have abortions. *See About NIFLA*, National Institute of Family and Life Advocates, https://nifla.org/about-nifla/ (last visited Feb. 25, 2018) ("using ultrasound in a pregnancy center for reaching abortion-minded women" is only reason posited for obtaining medical license in "Medical" section on "About NIFLA" page); *see also Frequently Asked Questions*, Heartbeat

International, https://www.heartbeatservices.org/about-us/faqs#CN (last visited Feb. 24, 2018) (ability to perform ultrasound scans is only "medical service[]" mentioned in section discussing medical licensing).

These licensed CPCs deliberately attract women seeking unbiased counseling, contraceptives, and abortions that they do not provide, and they refuse to offer referrals to providers who do. The FACT Act appropriately mandates that licensed clinics specializing in family planning or pregnancy-related care provide notice to women that they are eligible for state-funded comprehensive family planning services, prenatal care, and abortion. Cal. Health & Safety Code § 123472(a)(1).

Patently false utterances that directly endanger life are not protected speech. As Justice Holmes famously put it, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre[.]" *Schenck v. United States*, 249 U.S. 47, 52 (1919). In light of the widespread falsehoods inimical to women's lives and health pushed by CPCs, California's interest in correcting this deception is not merely important but compelling. The FACT Act's requirements are narrowly tailored to the women's health issues they address, imposing no unconstitutional burden on CPCs' First Amendment rights.

ARGUMENT

I. CRISIS PREGNANCY CENTERS USE DECEPTIVE TACTICS TO LURE IN WOMEN, GIVE THEM MEDICALLY INACCURATE INFORMATION, AND UNDERMINE THEIR ACCESS TO REPRODUCTIVE HEALTHCARE

Licensed and unlicensed CPCs commonly employ deceptive tactics to draw women into their facilities. As the Ninth Circuit observed, "[f]alse and misleading advertising by clinics that do not provide abortions, emergency contraception, or referrals to providers of such services has become a problem of national importance." *First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1268 (9th Cir. 2017).

Inside their doors, CPCs "distribute misleading, medically inaccurate, and false information regarding abortion risks, sexually transmitted infections, and contraceptive effectiveness[.]" *Regulating Disclosure of Services and Sponsorship of Crisis Pregnancy Centers*, Policy Number 20113, American Public Health Association (Nov. 1, 2011), https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/22/08/33/regulating-disclosure-of-services-and-sponsorship-of-crisis-pregnancy-centers. They "frequently target women who are young, members of minority groups, or financially disadvantaged, and multiple investigations have found that CPCs often engage in techniques that are coercive, threatening, misleading, and aggressive toward these vulnerable groups[.]" *Id.*

The more-than 200 licensed and unlicensed CPCs operating in California generally adopt the form of "local non-profit organizations." S. Comm. on Health,

Reproductive FACT Act 4, Cal. S. Reg. Sess. 2015-2016 (May 4, 2015). But they typically "receiv[e] substantial funding and resources from at least one large pro-life umbrella organization[] such as[] Care Net, [Heartbeat International], and the National Institute of Family and Life Advocates." *Id.* (citing Casey Watters *et al.*, *Pregnancy Resource Centers: Ensuring Access and Accuracy of Information*, Public Law Research Institute, U.C. Hastings College of Law (April 1, 2011) (citations reviewed and updated June 1, 2015)).

A. CPCs Commonly Use Deception to Get Women in the Door

"Crisis Pregnancy Centers['] ... primary purpose is to prevent women who are experiencing unintended pregnancy from seeking abortions by purporting to counsel women on their pregnancy options." *Regulating Disclosure of Services and Sponsorship of Crisis Pregnancy Centers*, American Public Health Association, *supra*; *see also* Pet'rs' Br. at 17. They and their operators have the right to advocate against birth control or abortions. But most CPCs hide their true intentions and instead adopt strategies to attract women who seek the very care CPCs do not provide: unbiased counseling, emergency contraceptives, and abortions. Many would never provide any contraceptives. They step well past the bounds of protected advocacy into deception that endangers women.

One tactic with deep roots is the adoption of "misleading names, such as 'Pregnancy Options Clinic' or 'Women's Resource Center,' which are similar to those used by comprehensive women's health clinics and imply that they discuss a full range of options." *Unmasking Fake Clinics: The Truth About Crisis*

Pregnancy Centers in California 6, NARAL Pro-Choice California Foundation (2010) ("*California CPC Investigation*"), available at: https://www.sfcityattorney.org/wp-content/uploads/2015/08/Unmasking-Fake-Clinics-The-Truth-About-Crisis-Pregnancy-Centers-in-California-.pdf.

In an early iteration of this tactic in the 1980s, an anti-abortion clinic, which provided no healthcare, operated in North Dakota under the name Women's Help Clinic, in order to draw women seeking healthcare away from a real medical clinic called Women's Health Organization, which offered comprehensive reproductive care, including abortions. *Fargo Women's Health Org., Inc. v. Larson*, 381 N.W.2d 176, 177-78 (N.D. 1986). Because Women's Help Clinic (the sham clinic) "mis[led] persons into believing that abortions [we]re conducted at the clinic with the intent of deceptively luring those persons to the clinic to unwittingly receive anti-abortion propaganda[,]" the North Dakota Supreme Court upheld a preliminary injunction prohibiting Women's Help Clinic from continuing to operate under that name or otherwise "falsely lull[ing] people that come to them for counseling into thinking that they are, in fact, the Women's Health Organization or the Fargo Women's Health Organization, Inc." *Id.*

Present day CPCs have merged the tactic of deliberately adopting names similar to those of comprehensive family planning clinics with the additional strategy of locating themselves next to existing healthcare clinics to confuse women looking for care. *Crisis Pregnancy Centers Lie: The Insidious Threat to Reproductive Freedom* 5, NARAL Pro-Choice America (2015) ("*NARAL National CPC Report*"), https://www.prochoiceamerica.org/wp-content/uploads/2017/04/cpc-report-2015.pdf. One CPC in Worcester,

Massachusetts went so far as to set up an office on the same floor of a building that housed a Planned Parenthood clinic and operated under the name "Problem Pregnancy" in order to use the same acronym: "PP." *Id.* When Planned Parenthood moved to a new location, Problem Pregnancy moved as well—directly across the street. *Id.*

Anti-abortion clinics similarly have long used the placement and language of advertisements to mislead women seeking abortions and other medical care. "Warna Lewis, pregnant and desiring an abortion, looked in the Yellow Pages directory under 'Abortion Information and Services' and found an advertisement for the 'AAA Pregnancy Problem Center' in St. Louis, Missouri." *Lewis v. Pearson Found., Inc.*, 908 F.2d 318, 318 (8th Cir.), *on reh'g*, 917 F.2d 1077 (8th Cir. 1990). When Ms. Lewis called and said she wanted an abortion, "a staff member at the Center stated that they would 'help her all they could,' and invited Lewis to come in to take a free pregnancy test." *Id.* at 319. Upon arrival, however, Ms. Lewis received no medical care and was instead ushered to a small room and subjected to a slide show of "dismembered fetuses and abortions being performed by means of crude-appearing instruments" interspersed with "intermittent family scenes." *Id.*; *see also California CPC Investigation* at 7, *supra*.

CPCs now have brought their misinformation into the digital age. Petitioner Pregnancy Care Clinic, located in El Cajon, California, is a good example. It maintains a website deceptively named "www.unplanned parenthood.org," adding only the "un" to what has long been Planned Parenthood's website "www.planned parenthood.org." *See* Pregnancy Care Clinic, www.unplannedparenthood.org (last visited Feb. 25, 2018). Petitioner's web site proclaims, "We are here to

help you," a header lists the word "abortion" between "symptoms" and "services," and visitors are encouraged to "make an appointment." *Id.* Unplannedparenthood.org gives every impression that it will help women obtain abortion or other reproductive or pregnancy care, but as Petitioner admits in its brief, in fact it offers only those services that "advance its pro-life mission." Pet'rs' Br. at 6. Thus, when women show up for their "appointments," Petitioner will provide, not pregnancy-related healthcare, but anti-choice "Abortion Education" and "Post-Abortion Healing Bible Study." *See Services*, Pregnancy Care Clinic, http://www.supportpcc.com/services/ (last visited Feb. 25, 2018); *see also California CPC Investigation* at 3, *supra* (describing one young woman's experience with such a clinic's deception).

CPCs have employed sophisticated strategies to make their own websites appear when computer users google words like "abortion clinic," "morning-after pill," and "women's health clinics." *NARAL National CPC Report* at 4, *supra*. According to one study, "79 percent of the [CPCs] that advertised on Google indicated that they provided medical services such as abortions, when, in fact, they are focused on counseling services and on providing information about alternatives to abortion." Tsukayama, *Google removes "deceptive" pregnancy center ads*, *supra*.

Care Net and Heartbeat International, two of the major CPC umbrella organizations, spend in excess of "$18,000 per month on pay-per-click advertising campaigns that target women searching for abortion providers and bring them to their websites and call center, Option Line." *California CPC Investigation* at 7, *supra*. Option Line will then refer women to the nearest CPC, which of course, will not offer abortion care, emergency contraception, or many other

healthcare services the referred patients were seeking. *See Id.*; Pet'rs' Br. at 33. In fact, women looking for contraception of any kind who book appointments through Option Line cannot possibly get the care they seek from the clinics Option Line refers them to, because Care Net and Heartbeat International, Option Line's sponsors, prohibit affiliated clinics from offering birth control altogether. *See Pregnancy Center Standards of Affiliation*, Care Net (January 2013), available at: http://cdn2.hubspot.net/hub/367552/file-2184386735-pdf/Preg-Center-Standards-of-Affilition-1-13-C.pdf?t=1418138924001; *Heartbeat Program Policies*, Heartbeat International, https://www.heartbeatservices.org/about-us (last visited Feb. 25, 2018). Heartbeat International includes among its policies a commitment not to "promote birth control (devices or medications) for family planning, population control, **or health issues, including disease prevention**." *Id.* (emphasis added).

Some anti-abortion organizations that had been upfront about their ideological mission have now adopted deceptive tactics. In 2005, Westside Pregnancy Clinic "had a website prominently featuring a photo of a woman's bare stomach and a dialogue box coming out of it saying, 'Don't forget about me[,]'" a nod at least to the entity's anti-abortion stance. *NARAL National CPC Report* at 15, *supra*. As of 2015, that same clinic's website falsely claimed to provide "'unbiased, confidential and free medical, educational and support services' for women facing an unplanned pregnancy." *Id.*

A San Francisco-based CPC previously known as "First Resort" changed its name to "Third Box" after losing high profile litigation it brought against the City and County of San Francisco. *See* Katie J.M. Baker, *New National Women's Clinic "Third Box" Has Anti-*

Abortion Past, BuzzFeed News (October 8, 2014), https://www.buzzfeed.com/katiejmbaker/new-national-womens-clinic-third-box-has-anti-abortion-past?utm_term=.lfGbd29Z6#.twBnE0klg; *see also First Resort*, 860 F.3d at 1268. Third Box now boldly claims "to offer the woman struggling with her choice the time, space and support to find her own voice." Amanda Marcotte, *New Anti-Choice Tactic: Pretend to Be Pro-Choice*, Slate (Oct. 9, 2014, 12:52 PM), http://www.slate.com/blogs/xx_factor/2014/10/09/third_box_anti_abortion_clinic_rebrands_itself_as_a_pro_choice_counseling.html. Its CEO, Shari Plunkett, however, believes "every woman's heart is telling her to carry to term, because God has placed truth in her heart, and *the truth is that abortion is never the right answer*." *Id.* (emphasis added).

When healthcare provider and insurer Kaiser learned then-First Resort's goal was not patient care but to make "the San Francisco Bay Area into an abortion-free community," it stopped making referrals to First Resort's clinics. *Kaiser Permanente: Refers Pregnant Patients to Anti-Abortion Counseling Clinic*, California Healthline (Jan. 15, 1999), https://californiahealthline.org/morning-breakout/kaiser-permanente-refers-pregnant-patients-to-antiabortion-counseling-clinic/.

Taking notice of the growth of deceptive advertising by CPCs, Google and Yahoo have taken steps to remove some of their ads. *NARAL National CPC Report* at 5, *supra*; Tsukayama, *Google removes "deceptive" pregnancy center ads*, *supra*. Because Google policy requires that advertisements be truthful, accurate, and factually supportable, it decided to remove certain deceptive ads after a reproductive-rights advocacy organization presented it with evidence of wide-spread deception. *Id.* Yahoo

soon after followed suit. Julian Hattem, *NARAL adds Yahoo success after Google*, The Hill (May 9, 2014), http://thehill.com/policy/technology/205701-after-pressure-yahoo-drops-crisis-pregnancy-center-ads. Even after certain deceptive advertisements were identified and removed, new misleading advertisements surfaced. Nicole Georges *et al.*, *Yahoo and Google are Still Running Deceptive Anti-Abortion Ads*, Vice News (May 9, 2014 12:20 PM), https://news.vice.com/article/yahoo-and-google-are-still-running-deceptive-anti-abortion-ads.

B. CPCs Spread Medical Misinformation, Delay Efforts to Find Appropriate Care, and Endanger Women Sometimes Through Incompetence

Investigators who reviewed a sample of 16% of CPCs in California found that only one-fifth disclosed their anti-abortion position in their advertising materials. *California CPC Investigation* at 8, *supra*. And yet, 69% of them falsely advertised their counseling services as "unbiased." Id. They trade instead in misinformation, fear mongering and bullying that is dangerous to women's health and lives. For example,

> Take Lilly, a woman in her 30s with four children, a happy marriage, and a satisfying career. In the current economic situation, she feels bringing another child into the world would be too financially challenging. Telling the CPC counselor this had no effect on the counseling Lilly received; the counselor did not respond to her questions or demonstrate compassion for her situation. Abortion was not discussed until Lilly mentioned it. The CPC counselor told her stories about women who died after having chosen to terminate a

> pregnancy, and told her she would regret it for the rest of her life.

California CPC Investigation at 12, *supra*; *see also* Tara Culp-Ressler, *"Crisis Pregnancy Center" Tells Woman Her IUD Was A Baby*, ThinkProgress, (March 13, 2015, 1:49 PM), https://thinkprogress.org/crisis-pregnancy-center-tells-woman-her-iud-was-a-baby-46b1b5eb8237/.

Once women walk through their doors and endure their "unbiased counseling," CPCs continue their deception by touting inaccurate information and inhibiting access to medically appropriate treatment options. Investigators who visited fourteen CPCs in four California counties found that most clinics provided information that is simply not true:

- 40 percent of these CPCs "advised that hormonal birth control increases the risk of infertility and breast cancer;"
- 60 percent "advised that condoms are ineffective in reducing pregnancy and the transmission of certain STDs;"
- 70 percent "advised that abortion increases the risk of breast cancer;"
- 85 percent "advised that abortion increases the risk of infertility" and;
- 85 percent "advised that abortion leads to mental health problems."

California CPC Investigation at 2, *supra*.

Each of these claims has been soundly refuted by the scientific community. *See id.*; *see also* Pam Belluck, *Pregnancy Centers Gain Influence in Anti-Abortion Arena*, N.Y. Times (Jan. 4, 2013), http://www.nytimes.com/2013/01/05/health/pregnancy-centers-gain-influence-in-anti-abortion-fight.html?_r=0&pagewanted=all;

Susan A. Cohen, *Abortion and Mental Health: Myths and Realities*, Guttmacher Policy Review, Vol. 9, Issue 3 (Aug. 1, 2006), https://www.guttmacher.org/gpr/2006/08/abortion-and-mental-health-myths-and-realities#boxref1.

High rates of misinformation among CPCs are common. *See* Waxman Report at 7, *supra* (finding that 87 percent of clinics surveyed "provided false or misleading information" and that "three major areas of misinformation involved (1) the purported relationship between abortion and breast cancer; (2) the purported relationship between abortion and infertility; and (3) the purported relationship between abortion and mental illness"); *see also* Belluck, *Pregnancy Centers Gain Influence in Anti-Abortion Arena*, *supra*; Abcarian, *Going undercover at crisis pregnancy centers*, *supra*. "[W]hile '[t]his tactic may be effective in frightening pregnant teenagers and women and discouraging abortion [,]' it 'denies [them] vital health information, prevents them from making an informed decision, and is not an accepted public health practice.'" *First Resort*, 860 F.3d at 1268 (quoting Waxman Report at 14).

One California woman described a shockingly misleading video provided by a CPC:

> [A] staff person gave me a video to watch at home. The video featured interviews with women who regretted their decision to choose abortion. Many of these women were being interviewed from prison. They graphically described their procedures .... Some of the women talked about how their abortions had made them infertile, or that they now had breast cancer or cervical cancer because of their abortions. But what they focused on the most were emotional side effects. They said

> you will regret the abortion for the rest of your life. One of the women described her suicide attempt. Many of the women claimed that their abortions caused them to become alcoholics, drugs addicts, and even criminals. One woman said, "Having had that abortion turned me into a crack head whore and no one told me this would happen." I had been told that the video would describe my options. Really it just told me to not have an abortion.

California CPC Investigation at 8, *supra.*

A brochure titled "Abortion: Some Medical Facts" distributed by one CPC claimed that while "no doubt an unwanted pregnancy can cause intense stress and hardship in a variety of ways ... the medical information is clear—the physical and psychological consequences of abortion can be far worse. Nine short months of pregnancy is a relatively small cost to pay in light of a lifetime of potential physical and mental health problems." *Id.* at 8 & n.54. The brochure then characterizes as "medical evidence" its assertions that "abortion causes breast cancer, infertility, and mental illness." *Id.*

Other California women have described similar misinformation provided directly by "counselors" at CPCs. One woman visited a CPC and recalled the following:

> The counselor told me that if I have an abortion the pregnancy hormones will stay in my body, especially my breasts .... These leftover hormones can disrupt the normal functions and cause cancer. And since the hormones are all over the body, the whole body can be affected.

Id. at 10. A "counselor" told another women that "condoms are like a bag of balloons. You know when you get a bag of balloons and they have a lot of holes in them? Well, condoms are like that, but you can't see the holes." *Id.*

Anti-abortion "counselors" made the same claims to an investigator, who visited forty-three CPCs in California. Abcarian, *Going undercover at crisis pregnancy centers, supra.* "Every clinic [she visited] spouted the lie that abortions cause breast cancer." *Id.* "Condoms," counselors told her, "have a bunch of little holes you might not know about." *Id.* According to these CPCs, birth control pills should never be used because they, " cause headaches and 'put hormones in your body you don't need.'" *Id.*

A woman, who visited "dozens" of CPCs, reported that this type of medical misinformation about pregnancy, abortion, and birth control was the rule, not the exception: "It's like everyone was trained by one person. I heard the same thing over and over again[.]" Culp-Ressler, *"Crisis Pregnancy Center" Tells Woman Her IUD Was A Baby, supra.* "[S]he always heard the same information about how abortion is supposedly linked to breast cancer, depression, and infertility. One employee told her that ending the pregnancy might puncture her uterus and close her Fallopian tubes, preventing her from having any more children in the future." *Id.*

Some CPCs also use unconscionable delay tactics to make it unlikely or impossible for women to obtain the care they seek. CPCs sometimes "attempt to lull women into believing they have as much time as they want to make a decision. CPC workers tell women that they don't need to make a decision because their pregnancy may terminate naturally ... [because] the

likelihood of a miscarriage is 30-50 percent." Jenny Kutner, *Crisis pregnancy center tells woman her IUD is "your baby," plus countless other lies*, Salon (March 18, 2015), https://www.salon.com/2015/03/18/crisis_pregnancy_center_tells_woman_her_iud_is_your_baby_plus_countless_other_lies/. According to the American College of Obstetricians and Gynecologists, the miscarriage rate is less than half that high—just 15 percent. *Id.*

"One CPC volunteer in Maryland told an investigator posing as a pregnant woman, 'Don't panic. Abortion is legal through all nine months of pregnancy, so you have plenty of time to make a decision.'" *NARAL National CPC Report* at 14. A New York clinic made the same claim to another investigator. *Id.*

Therese McCluskey, the perinatal services coordinator for the Alameda County Public Health Department, informed the California Legislature that women who transfer from anti-abortion clinics to the clinics she oversees are typically too far along in their pregnancy to obtain an abortion. Molly Redden, *One State Finally Cracked Down on Deceptive Anti-Abortion Pregnancy Centers*, Mother Jones (Oct. 12, 2015), https://www.motherjones.com/politics/2015/10/state-just-became-first-crack-down-deceptive-anti-abortion-pregnancy-centers/.

A number of CPCs deliver misinformation due to incompetence. Poorly trained, or entirely untrained, staff have mistaken multiple women's intrauterine contraceptive devices (commonly known as "IUDs") for fetuses. Abcarian, *Going undercover at crisis pregnancy centers*, *supra* ("After inserting the wand, the sonogram technician mistook [Dania] Flores' IUD for a fetus, and informed her it did not have a

heartbeat."); Culp-Ressler, *"Crisis Pregnancy Center" Tells Woman Her IUD Was A Baby, supra* ("Cristina asked for an ultrasound at several centers; at two of them, the staff incorrectly identified her IUD as her 'baby.'"); Jenny Kutner, *Crisis pregnancy center tells woman her IUD is "your baby," plus countless other lies, supra.*

II. CPCs' DECEPTIVE TACTICS AND MISINFORMATION HARM WOMEN, ESPECIALLY LOW-INCOME AND OTHER VULNERABLE WOMEN, JEOPARDIZING THEIR LIVES AND HEALTH AND AT GREAT COST TO THE PUBLIC

Aside from the injury of being deceived, lectured, bullied and shamed, CPCs' tactics harm women in numerous ways that directly risk their lives and health. These harms tend to fall most heavily on women in vulnerable circumstances. As the California Legislature found, delay alone causes harm to women seeking reproductive healthcare. *See* 2015 Cal. Legis. Serv. Ch. 700 (A.B. 775) § 1(c). Indeed, "[w]hen a woman is misled into believing that a clinic offers services that it does not in fact offer, she loses time crucial to the decision whether to terminate a pregnancy, and may also lose the option to choose a particular procedure, or to terminate a pregnancy at all." *First Resort*, 860 F.3d at 1269. Delays in accessing care can push women into later, more complex procedures with their increased chance of complications. *See Waiting Periods for Abortion*, Guttmacher Institute (January 2018), https://www.guttmacher.org/evidence-you-can-use/waiting-periods-abortion. In some cases, termination may no longer be an option. *See First Resort*, 860 F.3d at 1269.

When CPCs impede women's access to contraceptives and shame women who ask about them, they harm those women by increasing their risk of future unintended pregnancy. The data show that access to contraception is the best prophylactic against unintended pregnancy. *See State Facts About Unintended Pregnancy: California,* Guttmacher Institute (2017), https://www.guttmacher.org/sites/default/files/factsheet/up-ca.pdf. This is particularly true for low-income women, who experience the greatest barriers to contraceptive care and, consequently, have the highest rates of unintended pregnancies. *State Facts on Publicly Funded Family Planning Services: California,* Guttmacher Institute (September 2017), https://www.guttmacher.org/fact-sheet/state-facts-publicly-funded-family-planning-services-california#1.

In order to reduce these barriers, federal and state governments, including California, and other organizations have invested in making family planning services more widely available. *State Facts About Unintended Pregnancy: California,* Guttmacher Institute, *supra.* Indeed, Eighty-seven percent of Planned Parenthood patients in California are at or below 200% of the federal poverty line and 71% are members of ethnic or racial minorities. *See California Planned Parenthood Education Fund, Inc. Fact Sheet,* Planned Parenthood Affiliates of California (2015), available at: http://www.ppactionca.org/voter-resources/fact-sheets.html.

Due in part to these efforts, two-thirds of women at risk of unintended pregnancy use contraceptives consistently. *State Facts About Unintended Pregnancy: California,* Guttmacher Institute, *supra.* Despite CPCs' claims to the contrary, those contraceptives work: Women consistently using

contraceptives "account for only 5% of all unintended pregnancies, while the remaining 95% of unintended pregnancies are attributable to the one-third of women who do not use contraceptives or who use them inconsistently." *Id.*

Because the CPCs frequently attract "clients by advertising free services, such as pregnancy tests, ultrasounds, and prenatal classes[,]" women most in need of free medical care are drawn in, and low-income women bear the brunt of CPCs' deception. *California CPC Investigation* at 6, *supra*. Yet these women often have the most to gain from the services provided by true healthcare clinics. In 2011, the rate of unintended pregnancy among women with incomes below the federal poverty level was "more than five times the rate among women with incomes of at least 200% of the federal poverty level[.]" *Unintended Pregnancy In the United States*, Guttmacher Institute (September 2016), https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us_0.pdf. The difference in the unplanned birth rate was even higher. Poor women are *seven* times more likely to have an unplanned birth than women above 200% of the federal poverty line. *Id.*

The consequences of unintended pregnancy, not only for the woman and her child, but for the polity, are huge. "[A]n extensive body of research links births resulting from unintended or closely spaced pregnancies to adverse maternal and child health outcomes and myriad social and economic challenges." S. Comm. on Health, *Reproductive FACT Act* at 4, *supra*. Women have diminished opportunities for education, employment and career advancement. *See Analysis of California Senate Bill (SB) 999 Contraceptives: Annual Supply* 46, Cal. Health Benefits Review Program (March 28, 2016), http://analyses.chbrp.com/

document/view.php?id=1207. Maternal and child health and mortality suffer. *Id.* at i.

State funded programs intended to increase access to family planning services have been successful: "In 2014, 7.8 million women received publicly funded family planning services; these services helped women avoid 2 million unintended pregnancies, which would likely have resulted in 914,000 unplanned births." *State Facts About Unintended Pregnancy: California*, Guttmacher Institute, *supra*. But CPCs' deceptive tactics undermine the options the State makes available to women.

"In California, low-income women can receive immediate access to free or low-cost comprehensive family planning services and pregnancy-related care through the Medi-Cal and the Family PACT programs." 2015 Cal. Legis. Serv. Ch. 700 (A.B. 775) § 1(c). When CPCs' deception draws low-income women seeking contraceptives or abortion into clinics that do not offer those services, many of these women lack the resources to take additional time off of work or school or to arrange for childcare to make a second trip to a true healthcare clinic. If they are ensnared by CPCs, many of these women may never gain access to the options available to them.

The cost of showing up at the wrong clinic can be greater for women living in rural areas. The rural counties in California are much poorer and have higher rates of unintended pregnancies, including teen pregnancies. *See* Laura Santhanam, *Why is the teen birth rate so much higher in rural areas?*, PBS (Nov 16, 2016 10:28 AM), https://www.pbs.org/newshour/health/teen-birth-rate-higher-rural-areas; *The California Healthcare Landscape*, The Henry J. Kaiser Family Foundation (Aug. 26, 2015), https://www.kff.org/health-

reform/fact-sheet/the-california-health-care-landscape/; Committee on Health Care for Underserved Women, Opinion Number 586, *Health Disparities in Rural Women*, American College of Obstetricians and Gynecologists (February 2014), https://www.acog.org/Clinical-Guidance-and-Publications/Committee-Opinions/Committee-on-Health-Care-for-Underserved-Women/Health-Disparities-in-Rural-Women. They also face much greater provider shortages. *Id.* In California, the majority of CPCs are located in rural areas, and 93% of counties have at least one such clinic. *California CPC Investigation* at 6, *supra*. By contrast, only 59% of California counties host an abortion provider. *Id.* Women in rural counties looking for abortion care who go to the nearest "clinic" are more likely to find themselves at a CPC than a true healthcare clinic. "[R]ural Americans spend a higher percentage of their income on transportation," and "rural counties [in the United States] have a higher rate of car-lessness than urban counties." Lisa Pruitt, *Toward a Feminist Theory of the Rural*, 2007 UTAH L. REV. 421, 433-34 (2007). Following a trip to a CPC, driving to an actual medical clinic may be out of reach for many rural women.

Women in abusive relationships face disproportionate harm from CPCs' practices. "A pregnant woman in an abusive relationship is less likely to want or to have planned her pregnancy." Australian Institute for Judicial Administration, *Sexual and reproductive abuse*, National Domestic and Family Violence Bench Book § 3.1.2 (May 2017), http://dfvbenchbook.aija.org.au/understanding-domestic-and-family-violence/sexual-and-reproductive-abuse/. This is in part because abusive partners may refuse to use, or even may tamper with, contraceptives to exert control. *See, e.g.*, Rachel Camp, *Coercing Pregnancy*,

21 Wm. & Mary J. Women & L. 275, 276 (2015). For example, "Jessica became pregnant less than four months into dating her boyfriend. As she described it, 'he refused to give me funds to purchase birth control, and always refused to use condoms after we became exclusive.'" *Id.*

It is all the more important that women in such situations have convenient access to "discrete methods of contraception that are less susceptible to tampering, such as an intrauterine device, subdermal implant, or contraceptive injection[.]" Kathryn Doyle, *Reproductive Control Can be a Form of Partner Violence*, Reuters (September 4, 2015), https://www.reuters.com/article/us-health-sexassault-coercion/reproductive-control-can-be-a-form-of-partner-violence-idUSKCN0R42CD20150904. These services, of course, are entirely unavailable at Petitioners' clinics and other CPCs. *See Our Services*, Fallbrook Pregnancy Resource Center, http://www.fallbrookprc.com/Our-Services (last visited Feb. 25, 2018) (listing "Abstinence encouragement" as sole service offered to reduce likelihood of unplanned pregnancy); *Services*, Pregnancy Care Clinic, http://www.supportpcc.com/services/ (last visited Feb. 25, 2018) (offering only "Natural Family Planning Information" and "Abstinence Education" as forms of birth control); *About NIFLA*, National Institute of Family and Life Advocates, https://nifla.org/about-nifla/ (last visited Feb. 25, 2018) (providing "ultrasound" scans to convince women not to seek abortions as single example of medical care provided by NIFLA-affiliated clinics).

Finally, some CPCs endanger women and their babies through poor care. Sally Greenwald, an OB-GYN specialist at the University of California—San Francisco, testified before the California Legislature about "taking over the care of a pregnant diabetic

woman from a pro-life center." Redden, *One State Finally Cracked Down on Deceptive Anti-Abortion Pregnancy Centers, supra.* The previous provider "had failed to treat the woman's alarming blood sugar levels," resulting in the fetus's exposure "to lifelong risks, such as cardiac malformations, brain anomalies, and spine deformations." *Id.* Had the patient been transferred to Dr. Greenwald's care sooner, she testified, "[w]e could have lowered the sugar in her blood and we could have had better outcomes both for mom and for baby." *Id.*

Therese McCluskey of the Alameda County Public Health Department testified that when women transfer from anti-abortion clinics to those run by the County, they frequently come "without prenatal records, lab reports, or the pregnancy verification form that entitles them to pregnancy-related health care." *Id.*

III. BOTH UNLICENSED AND LICENSED CPCs ENGAGE IN REGULATORY EVASION THAT THE REPRODUCTIVE FACT ACT APPROPRIATELY REMEDIES WITHOUT UNDUE RESTRICTION ON THE CPCs

To facilitate their campaign of deceptive advertising, biased "counseling," and medical misinformation, CPCs deliberately evade some of California's healthcare regulations. This is most obvious in the case of unlicensed CPCs, which operate entirely outside of the State's healthcare quality regime. *See* Cal. Health & Safety Code § 1200. Licensed CPCs also have taken advantage of regulatory loop-holes in order to give the impression that they offer comprehensive care but then refuse to

refer patients to other providers when they seek care the CPCs do not offer.

A. Unlicensed CPCs Deliberately Evade California's Healthcare Licensing Regime

California law exempts from ordinary licensing requirements entities "that solely provide advice, counseling, information, or referrals on the maintenance of health or on the means and measures to prevent or avoid sickness, disease, or injury[.]" Cal. Health & Safety Code § 1200. The majority of CPCs in California thus operate without a license. *See California CPC Investigation* at 5, *supra*.

While "[t]heir staff members often wear white coats and their waiting rooms look like any other doctor's office," Culp-Ressler, *"Crisis Pregnancy Center" Tells Woman Her IUD Was A Baby*, *supra*, unlicensed CPCs have "clients read their own pregnancy tests," *California CPC Investigation* at 5. By providing only "counseling," unlicensed CPCs avoid extensive clinical quality and patient protection regulations.

Yet unlicensed CPCs go to great lengths to appear to be medical clinics without subjecting themselves to state regulation. In one particularly telling example,

> two investigators from NARAL Pro-Choice California Foundation were alarmed when a San Jose [CPC] counselor insisted that the potentially pregnant patient self-administer her urine test. Holding a Dixie cup of her own urine, [the] investigator was led to the back of the CPC where she used a dropper to transfer her sample to the pregnancy stick while the CPC counselor watched. Because the test never leaves the hands of the client, the CPC

> has exploited a loophole in which it is free to operate in an unregulated manner.

Id.

Many CPCs offer free ultrasound examinations as a way to draw in clients and heighten the appearance of medical legitimacy. *NARAL National CPC Report* at 16. Petitioner Fallbrook Pregnancy Resource Center, for example, advertises on its website free ultrasound scans that "will tell you if your pregnancy is viable and how far along you are." *Our Services*, Fallbrook Pregnancy Resource Center, http://www.fallbrookprc.com/Our-Services (last visited Feb. 25, 2018). "This information," it adds, "may determine what options are available to you." *Id.* Yet in its brief, Fallbrook acknowledges being "an unlicensed center that offers 'non-medical pregnancy-related information and services.'" Pet'rs' Br. at 6. By advertising the service perhaps most associated with prenatal healthcare and offering to diagnose whether a pregnancy is viable, Fallbrook adopts the veneer of something it is not: a licensed medical facility.

The FACT Act is a more than appropriate response to these deceptions. An unlicensed clinic like Fallbrook need only state what is true: "This facility is not licensed as a medical facility by the State of California and has no licensed medical provider who provides or directly supervises the provision of services." Cal. Health & Safety Code § 123472(b)(1).

Against the backdrop of systematic deception and regulatory evasion documented above, it is little wonder the lower court held that this disclosure "survives any level of review." *Nat'l Inst. of Family & Life Advocates v. Harris*, 839 F.3d 823, 844 (9th Cir. 2016). "[D]isclosure requirements trench much more

narrowly on an advertiser's interests ... [because] warnings or disclaimers might be appropriately required in order to dissipate the possibility of consumer confusion or deception." *Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (internal quotation marks and ellipsis omitted). In the context of healthcare, and in the face of many CPCs' deliberate duplicity, the risks of confusion and deception are at their apex. The disclosure requirement California mandated is entirely reasonable.

B. Licensed CPCs Evade Regulations that Would Require Them to Provide Referrals for Medically Appropriate Care

As noted, some CPCs have obtained California licenses to operate as community, free, or intermittent clinics. *See* Cal. Health & Safety Code §§ 1204, 1206; Assemb. Comm. on Judiciary, *Reproductive FACT Act* 5, Cal. Assemb. Reg. Sess. 2015-2016 (April 16, 2015). Like other practices described above, this one has been pushed by major anti-contraception and anti-abortion umbrella organizations, including Petitioner NIFLA. *California CPC Investigation* at 5, *supra*.

But as NIFLA's website makes clear, the purpose of garnering clinical licenses is not to provide medical care to women. *See Medical Clinic Conversion*, National Institute of Family and Life Advocates, https://nifla.org/medical-clinic-conversion/ (last visited Feb. 25, 2018). Instead, it is to obtain ultrasound practice rights in order to convince women not to have abortions. *Id.* ("Established pro-life medical clinics report than more than 80 percent of abortion-minded mothers choose life after they see their unborn baby via ultrasound. ... Our goal is to have more pro-life

medical clinics in operation using the invaluable tool of ultrasound[.]"); *see also A Comprehensive Medical Conversion Program*, National Institute of Family and Life Advocates, https://nifla.org/life-choice-project-tlc/ (last visited Feb. 25, 2018) ("Because ultrasound is such an invaluable tool in revealing the personhood of unborn children, pro-life pregnancy centers across the nation are seeking to transition to medical clinic status so they may provide this critical resource to vulnerable women.").

CPC network Care Net noted the reason its affiliates perform ultrasound scans in a press release titled "Ultrasound May End Abortion," emphasizing its view that "ultrasounds deter women from getting abortions." Care Net (June 5, 2003), https://www.care-net.org/press-release-060503. Subsequent publications have reemphasized this monothemic approach to ultrasound scans. *E.g.*, *Why Ultrasounds Matter for Women Planning Abortion*, Care Net (Dec. 14, 2014), https://www.care-net.org/center-insights-blog/why-ultrasounds-matter-for-women-planning-abortion (discussing effectiveness of ultrasound scans as abortion deterrent).

Licensed CPCs must abide by regulations that apply to community health clinics. *See* Cal. Health & Safety Code §§ 1204, 1206. But they avoid many of the rules tailored to reproductive healthcare clinics by declining to participate in California's premiere reproductive healthcare program, the Family PACT, which "provide[s] comprehensive family planning services to low-income women and men." Cal. Dep't of Health Care Svcs., *Family PACT Overview* (June 2015), http://www.familypact.org/Providers/provider-resources/TipSheets/Overview6-15ADA.pdf; *see also* Cal. Welf. & Inst. Code § 24005.

Because over 2,000 reproductive healthcare providers participate in the Family PACT program, many quality control and patient protection regulations are made applicable through participation in the program rather than due to mere possession of a clinical license. *E.g.*, Cal. Welf. & Inst. Code § 24005(b) & (c) (requiring that participating clinics demonstrate their "licensed medical personnel [have the appropriate] family planning skills, knowledge, and competency" and that they provide referrals for "the full scope of family planning education, counseling, and medical services specified for the program").

CPCs claim they decline to participate in the Family PACT program because participation "requires a center to provide abortifacients and birth control." Pet'rs' Br. at 10. Thus, they argue, involvement in the program would undermine their "pro-life views." *Id.*

Of course they are free to refuse to participate and thus not share in the state benefits that participation would bring them. But their reasoning for abstaining is fatally flawed. Participation in the Family PACT would not require anti-abortion clinics to provide medical services to which they object. Family PACT participants may offer "the full scope of family planning education, counseling, and medical services specified for the program, either directly *or by referral* ...." Cal. Welf. & Inst. Code § 24005(c) (emphasis added).

C. The Reproductive FACT Act's Notice Requirement Appropriately Applies to Licensed CPCs and Exempts Licensed Clinics which Provide All Services Listed on the FACT Act's Notice

1. The Reproductive FACT Act Provides Women a Minimally Intrusive Escape Hatch from the Trap Set by Licensed CPCs

California's Reproductive FACT Act requires certain clinics "whose primary purpose is providing family planning or pregnancy-related services" to post a notice allowing women to obtain appropriate care if they find themselves in clinics that will not meet their needs. Cal. Health & Safety Code §§ 123471(a), 123472(a). Anti-abortion and anti-birth control clinics need only provide a short, truthful message:

> California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number].

Cal. Health & Safety Code § 123472(a). In fact, these clinics have several options for distributing this notice in the least intrusive manner: by posting a 8.5 x 11 inch sign, offering a 14-point type notice to incoming clients, or providing a digital notice to clients. *Id.* No staff member is required even to breathe a pro-choice word nor forced to introduce women to particular family planning providers or issue formal medical referrals. The only function of the notice is to inform

women that they have options beyond the limited set presented by CPCs.

In the absence of such a notice, many women are caught in the trap created by deceptive CPCs. A web search for a licensed clinic specializing in reproductive healthcare by a woman seeking abortion care is likely to point her to the nearest licensed CPC. *See* Section I.A., *supra*. The CPC will not provide the care she seeks. *See id.* But without disclosing its true intention, the CPC will invite her to schedule an appointment with the aim (known only to the clinic) of dissuading her from having an abortion. *Id.* When the patient arrives and discovers the CPC will not provide the care she needs, she might ask to be referred to a clinic that will. But despite holding a state-issued medical license, the CPC will decline to give its patient medically relevant information about the care she seeks. *Id.* Rather than deny anti-abortion clinics licenses altogether for their refusal to provide women with medically relevant information or direct patients to other care providers who can meet their needs, the State has simply ensured that these clinics inform patients how to learn about their options.

2. The FACT Act Reasonably Exempts from the Licensed Clinic Notice Requirement those Licensed Clinics which Provide All Services Listed on the FACT Act's Notice

Petitioners seize on the FACT Act's exemption for licensed clinics that participate in both the Family PACT and Medi-Cal, *see* Cal. Health & Safety Code § 123471(c)(2), to claim that CPCs have been unfairly singled out. Pet'rs' Br. 33-34. There is nothing wrong with the State's determination that "a licensed primary care clinic that is both a Medi-Cal provider

and a Family PACT provider [already] offers the full continuum of health care services" specified in the disclosure. Assemb. Comm. on Judiciary, *Reproductive FACT Act* at 9, *supra*. It would, thus, be duplicative for enrolled clinics to post the mandated information they are already required to provide.

Family PACT participants are required to determine whether patients are eligible for the program and inform patients of the service available to them. *Compare* Cal. Dep't of Health Care Svcs., *Family PACT Program Standards* 2 (Jan. 2018), available at: http://www.familypact.org/Providers/policies-procedures-and-billing-instructions *with* Cal. Health & Safety Code § 123472(a). And Family PACT providers already must provide much more extensive disclosures to all patients who enter their facilities. *See* Cal. Dep't of Health Care Svcs., *Family PACT Program Standards* at 2 & 12, *supra* (requiring Family PACT participants to "provide[] to all clients or post[] in a prominent place at the site of clinical services" a statement, which, among other things, advises that patients have the right to "adequate and objective education and counseling," "to participate in selecting the contraceptive method(s) to be used," and "to consent to, or refuse, any contraceptive method, test, examination or treatment"). It would make little sense for the Legislature to require the very clinics that administer the "public programs that provide immediate free or low-cost access to comprehensive family planning services ..., prenatal care, and abortion for eligible women" to provide an extra disclosure stating their existence. *See* Cal. Health & Safety Code § 123472(a).

CONCLUSION

This Court should affirm the Ninth Circuit's judgment that the FACT Act is a reasonable regulation of commercial and professional speech, narrowly crafted to deal with an epidemic of falsehoods that constitutes an imminent danger to many women's lives and health.

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Respectfully submitted,

SANFORD JAY ROSEN
Counsel of Record
GAY CROSTHWAIT GRUNFELD
DEVIN W. MAUNEY
ROSEN BIEN GALVAN & GRUNFELD LLP
50 Fremont Street, 19th Floor
San Francisco, California 94105
(415) 433-6830
srosen@rbgg.com

Counsel for Amici Curiae Equal Rights Advocates, Planned Parenthood Affiliates of California, California Women Lawyers, Hadassah, and the Family Violence Appellate Project